

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 2, 2008

TO : Cornele A. Overstreet, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bellagio, LLC d/b/a Bellagio Hotel-Casino;
Perini Building Company; Schuff Steel Company, as
joint employers
Case 28-CA-21714

International Association of Bridge, Structural, Ornamental
and Reinforcing Iron Workers, Local 433 (Schuff Steel)
Case 28-CA-6706

This case was submitted for advice as to whether the Employers violated Section 8(a)(1) and (3) by removing and transferring an employee from a construction project because he called 911, and thereby disrupted work at the jobsite, in response to another employee's bringing a military device on the jobsite; and/or whether the Union violated Section 8(b)(1)(A) by refusing to file a grievance regarding the employee's removal from the project.

FACTS

Bellagio Hotel-Casino is constructing a new hotel on the Las Vegas strip, utilizing Perini as the project manager/general contractor and Schuff as an ironworker subcontractor. The Region has determined that these entities are joint Employers of the construction workers at the site. Schuff has a collective-bargaining relationship with the Union, and alleged discriminatee Shaw, an employee of Schuff, was the union steward at the site.

On July 3, 2007, employee Gardner approached Shaw on the jobsite and asked if he could identify an apparent military device that Gardner had found in an off-site dumpster. Gardner told Shaw that he had also found three similar devices, which were still in the trunk of his car. Gardner identified the device as a "military target light sighting device," and instructed Gardner to return to work and that Shaw would take care of the situation. Shaw has testified that he tried to contact a member of the Perini Safety Committee, as required by the Perini safety

protocol, but was unable to reach her.¹ He then contacted a Union representative, who instructed him to call the Department of Homeland Security. According to Shaw, he then called Homeland Security/FEMA employee Bailey, with whom he served on a Nevada structural collapse rescue task force,² and Bailey instructed him first to call the head of Homeland Security and, when he couldn't reach that individual, to call 911.³ As a result of the 911 call, the Las Vegas police department was dispatched to the site, along with two helicopters, and work was temporarily disrupted while the area was scanned and cleared as safe.

¹ The Perini safety protocol, as embodied in a brochure signed by employees upon conclusion of safety training, includes the statement:

If you see something that's unsafe, report it to your supervisor. That's part of your job. Give your employer a chance to fix the problem. If you think the unsafe condition still exists, it is your right to file a complaint with the Nevada OSHA Enforcement Section of the Division of Industrial Relations.

There is also a sign posted at the project that includes the directions to:

CORRECT [sic] GUARD AND/OR REPORT ALL HAZARDS YOU
OBSERVE * * * [DO] NOT HAVE IN YOUR POSSESSION
ANY CONTROLLED SUBSTANCES OR WEAPONS

All employees sign a "badge request" form that states that "I understand that if I violate any policy or procedure, my badging privileges will be revoked."

² Shaw has a military background and a license to work with Nevada Task Force 1, part of the National Urban Search & Rescue Response System, which is one of 28 national task forces trained and equipped to handle structural collapse. These entities work with FEMA to provide assistance in structural collapse rescue.

³ Bailey's account of these communications is slightly different. He has stated, in a telephone call with the Region, that he instructed Shaw to call an individual at the Clark County Fire Department, not 911.

During this exercise, the police summoned Shaw to the front gate, where he surrendered the device Gardner had brought onsite, and police went to Gardner's car to retrieve the others. All of the devices have been identified as target-sighting parts of a weapons launcher that could contain nuclear parts and/or radioactive materials.

Shortly after Shaw surrendered the device to police, Bellagio security personnel called Shaw and Gardner to the office and questioned them regarding their involvement in the incident. At the conclusion of that meeting, Gardner and Shaw were told that they were no longer permitted on the project because they had failed to follow the safety protocol of contacting Bellagio/Perini security before taking other action. Based on this decision by Bellagio, Schuff transferred Shaw to another jobsite 35 miles south of Las Vegas.

Shaw contacted the Union to see if the Union could assist him in returning to work on the project. Union representative Lehnert met with the Perini Superintendent on Shaw's behalf, but was unable to convince him to allow Shaw back on the project. Lehnert then refused Shaw's request to file a grievance over his removal and gave him information regarding filing a charge with the Board. The Union contends that it could not file a grievance because Shaw was not discharged by Schuff, but rather was removed from the project by Bellagio, and the Union does not have a collective-bargaining agreement with Bellagio.

ACTION

We conclude that the Region should dismiss the charges, absent withdrawal, because Shaw was not removed from the project as a result of engaging in protected concerted activity, and the Union did not breach its duty of fair representation in refusing to file a grievance on his behalf.

It is undisputed that Shaw's actions caused a disruption of work on the jobsite, and that he was removed from the project for causing that disruption. If his conduct had involved protected, concerted activity, his removal arguably would have violated Section 8(a)(1).⁴ We

⁴ See Burnup & Sims, 379 U.S. 21 (1964) (employer violates Section 8(a)(1) when it discharges an employee based on a mistaken belief that the employee committed misconduct during the course of his protected activity). Thus, although he did not contact his supervisor or a guard, Shaw's efforts to contact a Safety Committee member may

conclude, however, that there is insufficient evidence that Shaw called 911 because he was concerned about employee safety or any other term and condition of employment. The device was hand-carried onto the project by Gardner, not discovered at the site, and if Shaw was seriously concerned about its danger, he would have instructed Gardner to carry it back off immediately. Rather, it appears that, notwithstanding Shaw's assertions regarding his safety concerns, he was more interested in demonstrating his ability to dispose of a military weapon sighting device, without regard to the consequences to the project.

We further conclude, in agreement with the Region, that the Union did not violate its duty of fair representation by refusing to file a grievance over Shaw's removal. The decision to ban Shaw from the project was made solely by Bellagio, with which the Union has no collective bargaining agreement, the Union made reasonable efforts to intercede with Bellagio on Shaw's behalf, and Schuff did not discharge Shaw but transferred him to another site.

Accordingly, the Region should dismiss the charges absent withdrawal.

B.J.K.

have complied with the safety protocol and, if so, the Employer's mistaken belief that Shaw had failed to follow the protocol would not have privileged its removal of him for engaging in protected concerted activity.